No. 86-863

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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

KENNETH KIZER, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

	Page
Cases:	
Aluminum Co. v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380 (1984)	3
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	3
Lyng v. *Payne*, No. 84-1948 (June 17, 1986)	2
NLRB v. *Iron Workers*, 434 U.S. 335 (1978)	2
Schweiker v. *Gray Panthers*, 453 U.S. 34 (1981)	6
Schweiker v. *Hansen*, 450 U.S. 785 (1981)	2
Young v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986)	3
Statutes and regulations:	
Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, 101 Stat. 680:	
§ 9, 101 Stat. 695	6
§ 15, 101 Stat. 698	6
Social Security Act, Tit. XIX, 42 U.S.C. (& Supp. III) 1396 *et seq.*:	
§ 1902(a)(10), 42 U.S.C. 1396a(a)(10)	7
§ 1902(a)(10)(A)(ii), 42 U.S.C. 1396a(a)(10)(A)(ii)	7
§ 1902(a)(10)(A)(ii)(IV), 42 U.S.C. 1396a(a)(10)(A)(ii)(IV)	7
§ 1902(a)(10)(A)(ii)(V), 42 U.S.C. 1396a(a)(10)(A)(ii)(V)	7
§ 1902(a)(10)(A)(ii)(VI), 42 U.S.C. 1396a(a)(10)(A)(ii)(VI)	7
§ 1902(a)(10)(C)(i)(III), 42 U.S.C. 1396a(a)(10)(C)(i)(III)	5
§ 1902(a)(17), 42 U.S.C. 1396a(a)(17)	7
§ 1903(f), 42 U.S.C. 1396b(f)	2, 3, 4, 5, 7, 8
5 U.S.C. 706(2)(a)	2
42 C.F.R. 435.1007	2
45 C.F.R. 233.20(a)(2)(v)	4
Miscellaneous:	
H.R. 3188, 100th Cong., 1st Sess. (1987)	8
H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. (1984)	6

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Miscellaneous – Continued: Page

H.R. Rep. 544, 90th Cong., 1st Sess. (1967) 4, 8
H.R. Rep. 100-85, 100th Cong., 1st Sess. Pt. 1 (1987) 6, 7
S. Rep. 100-109, 100th Cong., 1st Sess. (1987) 6, 7

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1. Neither respondents nor their supporting amici make any effort to support the principal holding of the court of appeals: that a statement in an unpublished internal agency manual constitutes a "legislative regulation" that binds the agency, even though the statement is contrary to the plain language of the relevant statute and to the agency's own, duly promulgated, rules. Unable to muster any credible defense for the court of appeals' holding, respondents and amici expressly disclaim any reliance upon that holding (see Resp. Br. 21 & n.17; Amici Br. Md., et al. 3 n.2; Amici Br. Calif. Ass'n Pub. Hospitals, et al. 5). Instead, they seek to recast the manual as a "valid guideline" (Resp. Br. 20), and offer a potpourri of arguments in favor of affording this "guideline" some measure of "deference" (Resp. Br. 21). Respondents' arguments, however, collapse just as quickly as does the "legislative regulation" theory of the court of appeals.

a. If the agency manual is not a legislative regulation, then it does not bind the agency. *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981) (Social Security Claims Manual "has no legal force, and * * * does not bind the SSA"); see also *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986), slip op. 10-11. And if the manual does not bind the agency, then it can be changed or repealed at any time, so long as the agency's new position is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(a); see, *e.g.*, *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978). Here, the Administrator of the Health Care Financing Administration *repudiated* the relevant provision of the regional office manual, explicitly finding that "[t]he ROM section is patently contrary to the statute and was, therefore, invalid from its origination" (Pet. App. 44a). As we have explained (Br. 22-29), this conclusion was plainly correct. The manual contradicted the express language of Section 1903(f) and the Secretary's implementing regulations (42 C.F.R. 435.1007). Thus, the Administrator's decision to repudiate the manual clearly is *not* arbitrary and capricious. If the manual does not bind the Secretary, and if the decision to repudiate the manual was not arbitrary and capricious, then the Administator's decision must be upheld.

Respondents attempt to bolster their contention that the manual is entitled to "deference" by asserting that the manual is consistent with the statute and regulations. Even if this were correct, it asks the wrong question. The decision under review does not endorse the manual; it repudiates the manual. Hence, the proper question is whether the *repudiation* of the manual is consistent with the statute and regulations. We submit that there can be only one possible answer to this question. Even if Section 1903(f) and the implementing regulations contain some latent ambiguity that would conceivably permit the agency to endorse the manual, there can be no question that the

repudiation of the manual, *i.e.*, the Administrator's decision that a family of two is not the same size as a family of three, is a rational interpretation of the statute and the regulations. A decision by an administrative agency adopting a rational interpretation of its own statute is entitled to significant deference, as this Court has repeatedly held. *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 7; *Aluminum Co.* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 389 (1984); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 865-866 (1984).[1]

b. In any event, respondents' efforts to discover some ambiguity in the statute do not withstand scrutiny. Respondents claim (Resp. Br. 28) that in Section 1903(f) Congress delegated authority to the Secretary to prescribe standards for determining when families are the "same size." Section 1903(f) does, of course, empower the Secretary to prescribe "standards." But it does not authorize the Secretary to suspend the laws of mathematics by finding that a family of two is the "same size" as a family of three. As our opening brief shows (at 28), the delegation of authority to set standards was directed at determining the *amount* that would ordinarily be payable to a family of the same size under the state's AFDC program, not at determining when families were the same size.

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[1] For this reason, respondents (Resp. Br. 21-24) and amici (Br. Calif. Ass'n Pub. Hospitals 12, 14) are incorrect in stating that the agency manual provision is entitled to judicial deference because courts have deferred to other provisions of other manuals. Our point is not that courts must always disregard interpretations that are set forth in agency manuals. We acknowledge that if the manual provision referred to in this case were the agency's only statement on the issue, if the manual provision were consistent with the statute, if the manual provision were consistent with the duly promulgated regulation, and if the agency had not rejected the manual provision as inconsistent with the statute, then the views expressed in the manual provision would be entitled to some consideration. But none of those predicates exist in this case.

Alternatively, respondents maintain (Br. 23) that the statute "create[s] an ambiguity by referring to the highest amounts 'ordinarily' paid to families of the same size under the AFDC program." But again, the use of the word "ordinarily" merely indicates that the Secretary has some discretion in determining the *amount* of benefits payable to an AFDC family of a given size; it does not suggest that the Secretary may select the level of benefits payable to a family of three in setting the medically needy income level for a family of two. Different AFDC families of the same size may receive different levels of benefits, depending on whether or to what extent they have "special needs." See 45 C.F.R. 233.20(a)(2)(v). Congress included the word "ordinarily" out of recognition that the Secretary would have to select, among a range of possible amounts payable to AFDC families of a given size, the amount that was most commonly or "ordinarily" received.

The legislative history of the 1967 amendments (which added the 133 1/3 percent cap on federal financial participation) supports the Secretary's reading. The provision which was ultimately enacted with modifications was the House provision, and the language of Section 1903(f) originated with the House bill. The Report of the House Committee on Ways and Means explained that (H.R. Rep. 544, 90th Cong., 1st Sess. 119 (1967)):

> The bill contains provisions intended to facilitate the calculations necessary under the limitations set forth above. Included in the amount ordinarily paid to a family under the AFDC program are not only amounts included in the State standard and made available to everyone in the State (such as food, shelter, and clothing), but also additional items which, although made available on a special needs basis, are provided to a major portion of persons receiving aid.

Clearly, Congress delegated to the Secretary authority to establish standards regarding the *amount* that would ordi-

narily be paid under the AFDC program. There is no support in the legislative history for the proposition that Congress granted the Secretary authority to determine that a family of two adults is the *same size* as a family of three.[2]

2. Bereft of any credible argument in support of affirming the judgment below based on Section 1903(f) or the manual provision, respondents place most of their eggs in the DEFRA moratorium basket. As we have explained (Br. 41-47), both the plain language of DEFRA and its legislative history demonstrate that the moratorium was directed exclusively at the Secretary's authority under a section of the Medicaid statute that is not at issue in this case – Section 1902(a)(10)(C)(i)(III) – *not* Section 1903(f). If there were any doubt on this score, it has been resolved by the enactment of a recent statute that retroactively clarifies the DEFRA moratorium in such a way as to establish conclusively that it does not apply to the 133 1/3 percent ceiling.

a. Respondents' DEFRA argument derives almost exclusively from portions of the Report of the House Committee on Energy and Commerce in 1984 that accompanied a proposal to amend Section 1903(f) in a manner that would have permitted states to exceed the 133 1/3 percent cap for families of two adults. Despite respondents'

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[2] There is no merit to respondents' attempt to denigrate the Secretary's position by labeling it a resort to "secret law" (Resp. Br. 25). Quite the contrary. There is nothing "secret" about the sources upon which we rely: the statute and the formal regulation, both of which plainly state that the cap on federal financial participation is 133 1/3 percent of the highest amount that the AFDC program would pay to a family of the *same size*. It is respondents who would have the courts direct the Secretary to approve state plans on the basis of unpublished manual provisions.

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mischaracterization of the House bill as something that was "passed" or "enacted" (Resp. Br. 15 & n.10), the House proposal was *deleted* by the Conference Committee from the final bill that was in fact passed by both houses of Congress, signed by the President and enacted into law (H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1361 (1984); see Pet. Br. 44-45).

b. Subsequent to the filing of our opening brief, Congress amended the DEFRA moratorium. Section 9 of the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, 101 Stat. 695 sets forth a "clarification" of the Medicaid moratorium provisions of DEFRA, and Section 15 of the new Act (101 Stat. 698) provides that "[t]he amendments made by section 9 of this Act shall apply as though they were originally included in the enactment of section 2373(c) of the Deficit Reduction Act of 1984." Thus, it is the amended statute that constitutes the law in effect at the time of this Court's decision.[3]

The amended moratorium provision expands the coverage of the earlier legislation by referring explicitly to four provisions of the Medicaid statute that were not included in the original moratorium provision: Section 1902(f),[4]

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[3] Under the recent amendment, the ending date of the moratorium remains 18 months after the Secretary submits the required report to Congress. That report was submitted to Congress on August 17, 1987, so the moratorium will expire on February 17, 1989, unless further extended by Congress.

[4] Section 1902(f) is the "209(b) option" discussed in *Schweiker* v. *Gray Panthers*, 453 U.S. 34 (1981), and is altogether distinct from the Section 1903(f) cap on federal financial participation that is at issue in this case. Both the House and Senate reports note that the 1987 amendment clarifies that the "moratorium applies to all States, including those States operating plans pursuant to section 1902(f) of the Social Security Act (relating to special eligibility rules for aged, blind, and disabled individuals receiving Supplemental Security Income)." H.R. Rep. 100-85, 100th Cong., 1st Sess. Pt. 1, at 24 (1987); S. Rep. 100-109, 100th Cong., 1st Sess. 24 (1987).

and clauses (IV), (V), and (VI) of Section 1902(a)(10)(A)(ii). But the amended moratorium provision, like its predecessor, does *not* refer to Section 1903(f). Clearly, if Congress had "intended" the original DEFRA moratorium to cover Section 1903(f), as respondents maintain, it would have so stated in a statute dedicated to clarification of the original scope of the moratorium. Instead, the Senate Report expressly rejects the notion that the moratorium was intended to relax the cap on federal financial participation set forth in Section 1903(f) (S. Rep. 100-109, *supra*, at 24-25) (emphasis added)):

> The provision only intends to permit States to broaden Medicaid eligibility by changing the rules under section 1902(a)(10) and (17) [5] that govern income and resource eligibility of individuals not receiving cash assistance. Medicaid eligibility cannot be broadened by changing other Medicaid requirements. *For example, the moratorium does not eliminate the limits on income and resources of eligible individuals and families under section 1903(f) (including the requirements that the applicable medically needy income level not exceed the amount determined in accordance with standards prescribed by the Secretary to be equivalent to 133 1/3% of the most generous AFDC eligibility standard* * * *. [6]

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[5] Several of the requirements of Section 1902(a)(10), such as the single standard requirement for the medically needy, are also repeated in Section 1902(a)(17).

[6] The House Report (filed almost two months prior to the filing of the Senate Report) states (H.R. Rep. 100-85, *supra*, Pt. 1, at 25) that:

> A State plan or policy could establish less restrictive medically needy income levels for an SSI-related elderly couple than is allowed to two-person AFDC-related household.

This statement confirms the view of the Secretary that under the DEFRA moratorium a State which has adopted a medically needy income level for an AFDC-related family of two may employ a more

3. Respondents' various arguments ultimately devolve to the proposition that, as a matter of social policy, the United States should subsidize California's decision to increase Medicaid benefits to certain families. As we have explained (Pet. Br. 2, 25 n.9), a state's authority to spend its own funds does not include unlimited discretion over the expenditure of federal funds.[7] There would be no dispute if California chose to provide more generous Medicaid benefits to two-adult families and to fund those benefits from the state treasury. As the 1967 House Report observed, Section 1903(f) "does not in any way place a limitation on what a State can do in developing a broad liberal program. It merely sets a limit on Federal sharing and leaves to the States the option to go beyond this, at their own expense" (H.R. Rep. 544), *supra*, at 118). But Congress, in enacting Section 1903(f), has imposed a carefully defined ceiling on the level of federal financial participation. If, as a matter of social and fiscal policy, this ceiling is to be lifted, that determination must also be made by Congress, not by the courts.[8]

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liberal income level for an SSI-related family of two adults. In other words, such a variation between categories of medically needy recipients does not violate the "same standard" requirement of TEFRA during the moratorium (see Pet. Br. 43-44). But the statement does not suggest that a State may set a two-adult income level in excess of the 133 1/3 percent cap.

[7] Amici Md., et al. note (Br. 2) that the federal government's reimbursement of state Medicaid benefits ranges as high as 70% of the total costs of state programs.

[8] See, *e.g.*, Section 4121 of H.R. 3188, 100th Cong., 1st Sess. (introduced by Representative Waxman on Aug. 7, 1987), a provision entitled "Medically Needy Income Levels for Certain 2-Member Couples in California" which, if enacted, would permit California to amend its Medicaid plan in the manner at issue in this case. That provision states:

> For purposes of section 1903(f)(1)(B) of the Social Security Act, for payments made to California on or after July 1, 1983, in the case of a family consisting only of two individuals both of whom are adults and at least one of whom is aged, blind, or disabled, the "highest amount which would ordinarily be paid to a family of the same size" under the State's plan approved under part A of title IV of such Act shall, at California's option, be the amount determined by the State agency to be the amount of the aid which would ordinarily be payable under such plan to a family which consists of one adult and two children and which is without any income or resources. Section 1902(a)(10)(C)(i)(III) of the Social Security Act shall not prevent California from establishing (under the previous sentence) an applicable income limitation for families described in that sentence which is greater than the income limitation applicable to other families, if California has an applicable income limitation under section 1903(f) of such Act which is equal to the maximum applicable income limitation permitted consistent with paragraph (1)(B) of such section for families other than those described in the previous sentence.

For these reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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